

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

To Be Argued On Appeal By:

HAROLD NISNEWITZ, PRO SE

77-1106

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1106

Bps
X

UNITED STATES OF AMERICA, Appellee

-v.-

HAROLD NISNEWITZ, Appellant

On Appeal From The United States District
Court For The Southern District Of New York

REPLY BRIEF OF THE APPELLANT

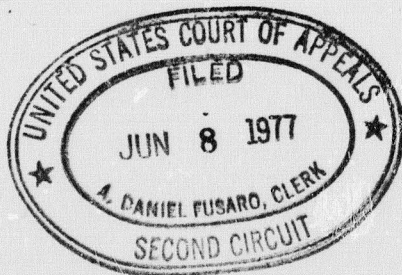
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UNITED STATES OF AMERICA,

APPELLEE

-V-

HAROLD NISNEWITZ,

APPELLANT
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On Appeal From The United States District Court

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UNITED STATES COURT OF APPEALS
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-V-

HAROLD NISNEWITZ,
APPELLANT

POINT I

THE MOTION FOR NEW TRIAL WAS TIMELY AND
SHOULD HAVE BEEN GRANTED BY THE DISTRICT
COURT.

Rule 33 of the Federal Rules of Criminal Procedure states that:

"The Court on motion of a defendant may grant a new trial to him if required in the interest of justice... A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two (2) years after final judgment..."

As evident in the original brief, filed with this Court, the motion was timely as it did not violate the two-year limit imposed by rule 33.

The question of the seven (7) day limit as raised by the counsel for the government is irrelevant with respect to the case at bar as the evidence presented to the District Court was "newly discovered" and meets all the tests for such evidence as per Johnson v. United States, 32 F. 2nd. 127 (8 cir. 1929).

The government's brief, questions the fact that the

evidence of alleged incompetence by court-appointed counsel was not newly discovered and thus was known to me during the trial. The government points to a letter (51 A) which was sent to Judges Owen, Lasker and Gurfein requesting that Mr. Friedman be removed as I felt he was incompetent. At the time, I had two other indictments pending against me of the same nature and could not communicate with said counsel. Based upon his performance at the trial I felt that he could not represent me satisfactorily in the future, thus I asked that he be replaced. I did not feel conclusively that he was incompetent.

An additional point raised by the Government concerns the fact that the incompetence of counsel was not raised on direct appeal. Incompetence was not raised on appeal for the simple reason that counsel, who undertook the appeal, never discussed with me the grounds for said action. I became cognizant of the grounds for appeal only when I received a copy of the brief and appendix which counsel had already filed with this Court. There was never any discussion between my attorney (David Brodsky, Esquire), and myself as to what the basis of the appeal would be.

The situation here, as contended by the government falls under United States v. Natelli, Docket No. 76-1494, Slip Op. 2557, 2560 (2 cir. March 28, 1977) I disagree with, for the simple reason that there was no way in which I could have known conclusively about the incompetence of Howard Friedman, Esquire, as I, as a layman, had never been the subject of a criminal prosecution before. As anyone in my predicament would do, I followed the instructions of my attorney to the letter as I knew nothing with respect to the procedures of the law.

In *United States v. Bertone*, 249 F. 2nd., 156, 158 (3 cir. 1957), the Court upon ruling on a Rule 33 motion, held that the motion

"asserted only trial errors and matters which were known by the defendant at the time of trial."

On the other hand, it should be pointed out as was done by the court in *United States v. Smith*, 331 U.S. 469, 475 (1947), that "new trials, however, may be granted for error occurring at the trial or for reasons which were not part of the court's knowledge at the time of judgment." (emphasis added)

The Government contends that since the alleged incompetence of counsel was not raised on direct appeal, it cannot be raised now or under a motion for collateral relief. In *United States v. Loschiavo*, 531 F. 2nd 659, 662, 663 (2 cir. 1976), the Court stated that "as a general proposition, of course, claims based upon constitutional errors or on a lack of jurisdiction in the broad sense of the court's power to adjudicate the issues, are not barred from being raised on collateral attack even though no direct appeal had been taken. *Sunal v. Large*, 332 U.S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982 (1947); *Bower v. Johnson*, 306 U.S. 19, 59 S. Ct. 442, 83 L. Ed. 445 (1939)..." (emphasis added). See generally also *Davis v. United States*, 417 U.S. 333 (1974).

While the government disputes the fact that the evidence was "newly discovered" within the meaning of Rule 33, they do not answer the other points which I made with respect to the other tests that I have shown to be met as per *United States v. Johnson*, 32 F. 2nd. 127 (8 cir. 1929), which merit the granting of the motion by the District Court.

First, due diligence on the part of the movant, see: *Reno v. United States*, 340 F. 2nd 307 (5 cir. 1965) and *Holmes v. United States*, 284 F. 2nd 716, 720 (4 cor. 1960), where the Court states that "when the newly discovered evidence bears upon the substantitive issue of guilt, we are necessarily concerned with its admissability upon a subsequent trial as its probable effect upon the result of that trial. When, however, it bears upon the integrity of the earlier trial, we apply a different set of standards to determine its sufficiency to support a timely motion. Whether the evidence warrants a new trial for the one reason or for the other, when it is newly discovered after the trial it is governed by the two (2) year limitation." (emphasis added).

Second, the evidence relied upon is not merely cumulative or impeaching. "Cumulative," as defined by Black's Law Dictionary, page 455, holds that "additional; heaping up; increasing; forming an aggregate. The word signifies that two things are to be added together, instead of being a repetition or in substitution of the other..." To "impeach" as defined by the Law Dictionary, by Steven H. Gifis, page 98, holds that "with reference to the testimony of a witness, to impeach means to call into question the veracity of the witness by means of evidence offered by or for that purpose, or by showing that the witness is unworthy of belief." 109, P. 2nd, 193, 195."

The evidence which was presented in Point II of my brief brought out inconsistencies in trial testimony on part of the government witnesses, the lack of preparation of my defense by my court-appointed counsel, and errors committed by him before, during and after the trial. This disputes the contention by the government that the evidence was only

of a nature which is "cumulative or impeaching." The evidence does more to impeach witnesses, it indicates inconsistencies in testimony, which in one instance amounted to perjury. (La Ferla, 82 A).

Third; the evidence is material to the issues involved. See *United States v. De Voe*, 493 F. 2nd 776, 780, 781 (5 cir. 1974).

Fourth; on retrial an acquittal would probably result. See *Estes v. United States* 254 F. Supp. 314, 326 (U.S. D.C., W.D. Texas, El Paso Division, 1966), *United States v. Miller*, 277 F. Supp. 200, 209 (U.S. D.C. D.C., Conn. 1967) and *United States v. Kelly*, 119 F. Supp. 217, 219 (U.S. D.C., D.C. 1954).

Fifth; in the interest of justice. See *Walcher v. United States*, 233 F. 2nd 748, 749 (9 cir. 1956), *United States v. Smith*, 179 F. Supp. 684, 686, 687 (U.S. D.C., D.C., 1959) and *United States v. Parulus*, 83 F. Supp. 617, 618, 622 (U.S. D.C., D. Hawaii, First Division, 1949).

Two other points must again be stated which the government does not answer in the brief. First, counsel who prosecuted the direct appeal (David Brodsky, Esquire), never filed with this Court a required motion as per Rule 5 (e) of the Federal Rules of Appellate Procedure which require that a defendant be informed of pro se procedures in order to file a petition for Writ of Certiorari to the Supreme Court. Rule 5 (e) states that "If, after an adverse of decision by the Court of Appeals, a review by the Supreme Court of the United States is to be sought, the appointed counsel, shall, after communication with the appellant and if requested to do so, petition the Court for Certiorari, unless upon proper motion filed within seven (7) days after entry of

judgment with supporting papers, indications that such petition for certiorari would be wholly frivolous, counsel is relieved of that obligation by the Court. If counsel is relieved, he shall within (seven) 7 days after such motion is granted so advise the appellant in writing and inform him concerning the procedures for filing a petition for Writ of Certiorari pro se..." (emphasis added).

I met with Mr. Brodsky prior to my incarceration and he informed me that he had already notified Ms. Hynes that a petition for certiorari would not be filed. No discussion of the matter between Mr. Brodsky and myself with respect to review by the Supreme Court ever took place.

A second point which the government fails to answer in its brief concerns the error by Judge Owen, when he stated in his memorandum endorsement" ... Defendant having unsuccessfully appealed and served his sentence this application is untimely..." (58 A) (emphasis added)

The sentence imposed by the Court was "One year and one day on each of counts 1 through 6, to run concurrently. One year and one day on count 7, to run consecutively with sentence imposed on counts 1 through 6. Execution on count 7 is suspended, and on that count defendant is placed on probation for a period of five (5) years, to commence upon expiration of sentence imposed on counts 1 through 6." (emphasis added) (9 A).

The District Court erred in that I am still serving a criminal sentence by virtue of the fact that I am on probation which can be revoked as per Title 18 U.S.C.A., section 3651. As evident in my original brief, the key word here is that the District Court suspended the "execution"

of the sentence on count 7 and placed me on five (5) years probation. But the sentence still stands. See *Berman v. United States*, 302 U.S. 211, 212, 213 (1937) with respect to execution of a sentence. See also the following, which hold that probation is a criminal sentence which cannot be imposed unless there is a judgment of conviction. *Nix v. United States*, 131 F. 2nd 857, 858 (5 cir. 1942), *Cooper v. United States*, 91 F. 2nd 195, 199 (5 cir. 1937), *Dillingham v. United States*, 76 F. 2nd 35, 36 (5 cir. 1935), *United States v. Koppelman*, 53 F. Supp. 499, 500, 501 (U.S. D.C. Md. Penn 1943), *United States v. Markovich*, 348 F. 2nd 238, 239, 240, 241 (2 cir. 1965) and *Gillespie v. Hunter*, 159 F. 2nd 410, 412 (10 cir. 1947).

The government does not answer this point, but only seeks to point out that the motion is untimely with respect to newly discovered evidence and thus should be denied. I submit that this point cannot be rebutted as it is good law and established the error committed by the District Court. The same can be said with respect to the failure of Mr. Brodsky to make the required motion as per rule 5 (e). Counsel without communicating to me first, informed the government that certiorari would not be sought.

Based upon the error committed by counsel and other inconsistencies, the decision of the District Court should be reversed and the case at bar remanded back to the District Court.

POINT II

IT HAS BEEN SHOWN THAT EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT RENDERED BY COURT-APPOINTED COUNSEL.

The motion for a new trial filed with the District Court contended that my conviction and subsequent incarceration were due to the incompetence of counsel appointed pursuant to the Criminal Justice Act. My attorney submitted a voucher to the District Court which was reduced by the presiding judge, Judge Owen, by more than fifty percent (50%) (46 A). The government contends that under Title 18, U.S.C., subsection 3006 A, the maximum amount allowable is \$1,000.00 as subsection 3006 A (d) (2). While this point cannot be rebutted on my part, the question must be raised as to why Mr. Friedman after rendering a voucher for \$2,020.00, receiving only \$1,000.00, did not then furnish the Court with the required substantiation in order to receive the additional fee due him.

Title 18, U.S.C. 3006 A (d) (3) states that with respect to the waiving of maximum amounts, "Payment in excess of any maximum provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the Court in which the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the court."

With respect to the filing of claims, section 3006 A (d) (4) provides that "A separate claim for compensation and reimbursement shall be made to the District Court for representation before the United States magistrate and the Court, and to each appellate court before which the

attorney represented the defendant. Each claim shall be supported by a sworn statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney..."

Counsel submitted a voucher for a total of \$2,020.00 for the services which he claimed he had rendered in my defense but only received \$1,000.00. But why then, if he rendered a voucher over the maximum allowed by law, did he not file with the district court a sworn affidavit in order that he could be paid the additional funds? I submit that counsel did not do this for the simple reason that he knew he could not substantiate his claims for additional services above the \$1,000.00 limit and that his only motive for filing this voucher was so that he would be sure to collect the maximum amount paid under the law-\$1,000.00. Thus, the enumeration of expenses in the voucher cannot be taken as truthful for the simple reason that they are not substantiated. The number of hours claimed for conferences and legal research do not indicate that my attorney put in this time as his claims were reduced because he could not provide the court with proof for his statements.

The government contends that based upon the evidence which I presented to the District Court with respect to counsel that the proof necessary to establish ineffective assistance has not been demonstrated. I must strongly and vehemently disagree. Counsel throughout the trial made serious errors which I submit were due to his limited preparation and lack of knowledge of relevant law. On two occasions the court and counsel

for the government went to the trouble of pointing this out. As previously stated in my brief, Mr. Friedman, a member of panel of court-appointed attorneys specifically empaneled to represent the indigent, was taken by me to mean, prima facie, that he was qualified and would represent me competently. In short, counsel is an officer of the court. As states most clearly in *Williams v. State*, 197 So. 562, 565 (1940), "The attorney being an officer of the court and when by the court appointed to represent, professionally, an indigent person charged with a felony, it then becomes his duty to render faithful and effective professional services so that the courts may so function that the legal rights of an indigent defendant may be determined and justice administered according to law." (emphasis added)

While it cannot be expected that trials will be free from mistakes, in *Burton v. United States*, 151 F. 2nd 17, 18, 19 C.C.A. D.C. 1945), the court held "that a defendant's rights may be so flagrantly disregarded by counsel of his own choosing, and as a consequence, justice so manifestly miscarry that a new trial should be ordered." (emphasis added)

In the case at bar, my attorney was appointed, leaving me no choice in the matter. In fact, the record in this case, the trial transcript, supports my allegations as to counsel's incompetence and lack of preparation. *Harshaw v. United States*, 542 F. 2nd 445, 456 (8 cir. 1976). As further elaborated in *United States v. Thompson*, 475 F. 2nd 931, (C.A.D.C., 1973) "the failure to investigate or to call particular witnesses surely may amount to ineffectiveness of counsel in certain circumstances. " This is proved when considering the level of representation afforded by counsel in light of the District Court reducing the

voucher submitted by my attorney, Mr. Friedman. If he could have substantiated his claims for preparation and research, he would have received additional funds. Since he did not, his claims as to research and preparation cannot be considered to be truthful. See *United States v. De Coster*, 487 F. 2nd 1197, 1202 (C.A. D.C., 1973).

Throughout the trial, numerous inconsistencies in testimony on the part of government witnesses came to light. Counsel could not correctly deal with these inconsistencies as I submit he was not prepared to go to trial to begin with. These incidents, as evident when analyzing the trial record which was done in the original brief. (See appendix-82 A, 83 A, 85 A, 86 A). On another occasion, when cross-examining another government witness, counsel questioned her about a statement which had not yet been introduced into existence. (59 A)

In this instance, counsel for the government pointed out to my attorney at the side bar that "you are obviously not asking the question properly.: (Tr. 125, lines 23-24).. In *Moore v. United States*, 432 F. 2nd 730, 737 (3 cir. 1970), the Court stated that "It is possible to examine the sufficiency of his preparation and the adequacy of his knowledge of the relevant law." Further, it has been said that a claim that the defendant was denied due process of law requires a showing that counsel's representation was 'so lacking in competency or good faith that it would become the duty of the trial judge or the prosecutor as an officer of the state to observe and correct it. For in such a trial the defendant would be practically without representation and it would therefore be a farce and mockery of justice.' *United States ex rel Darcy v. Hardy*, 203 F. 2nd 407, 477 (3 cir. 1953)" (emphasis added). See also 65 A, 72 A, 75 A and 76 A,

lines 14-15, where a government witness under the cross-examination of Mr. Friedman put into the record that I had, in his opinion, forged a W-2 form and counsel did not pursue this point at all.

Finally, counsel cross-examined another government witness at which point the Court called all attorneys up to the side bar and lectured Mr. Friedman, my able attorney, on the dangers which this cross-examination could produce (78 A Tr. 242 line 5-245 line 28). The Court pointed out as evident on page 245 lines 13-14 that this conversation "could open a lot of doors and it could also end up nowhere." As evident in *Moore v. United States*, 432 F. 2nd 730, 737 (3 cir. 1970) it was the duty of the judge to "observe and correct" the actions of counsel.

The government contends that the representation provided by counsel does not ever amount to a situation as seen under *De Coster*, where it could be said to not to be "reasonably competent." I must strongly disagree and submit that his representation of me amounted to the stricter requirement of a farce and mockery of justice under the rule established by *Diggs v. Welch*, 148 F. 2nd 667 (D.C. 1945). See also *Candarella v. United States*, 375 F. 2nd 222, 230 (8 cir. 1967), *Thomas v. Wyrick*, 535 F. 2nd 407, 413 (8 cir. 1976), *United States v. Easter*, 539 F. 2nd 663, 666 (8 cir. 1976), and especially *McKenna v. Ellis*, 280 F. 2nd 529, 599 (5 cir. 1960) where the court held that:

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. We consider undivided loyalty by appointed counsel to client as essential to due process." (emphasis added)

As evident from the above discussion of counsel's performance this holding cannot be taken lightly.

In *Rickenbacker v. Warden*, Docket No. 76-2036, Slip op. 1063 (2 cir., March 28, 1977). Judge Oakes dissenting, held that with respect to the continued adherence of the farce and mockery doctrine in the second circuit: "I think the time has come to follow the lead of the six other circuits (including the originating circuit) that have rejected the rule of *Diggs v. Welch*, 148 F. 2nd 667 (D.C. Cir.), cert. denied 325 U.S. 889 (1945)..." at 1074. Further, "we should join the several other circuits that have rejected *Diggs* as no longer having precedential value and declare it a dead letter, bringing the law of our circuit into line with the rule of, e.g. *United States v. De Coster*, 487 F. 2nd 1197 (D.C. Cir. 1973), that under the Sixth Amendment, 'a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate.' *id.* at 1202 (emphasis omitted)." at 1075-1076 (emphasis added). See also *Garton v. Svenson*, 412 F. Supp. 697, (U.S.D.C. W.D. Missouri, W.D. 1976).

With respect to the granting of a hearing in order to rule upon claims of ineffective counsel, the Court in *Powers v. United States*, 446 F. 2nd 22, 24 (5 cir. 1971), stated that "when petitioner's allegations, if proven, would entitle him to relief, he is entitled to an evidentiary hearing and an opportunity to prove the truth of the matters asserted...If petitioner can prove that which he has asserted, that is the ineffectiveness of counsel which deprived him of his constitutional rights either by conduct during trial or by failure to advise as to rights on appeal or incorrect and misleading advice as to appeal, he must be granted relief." (emphasis added). See also *Bishop v. Wainwright*, 511 F. 2nd 664, 666 (5

cir. 1975), Di Angelo v. United States, 406 F. Supp. 880, 884, 885 (U.S.D.C. Ed. Penn, 1976).

In United States ex rel., Marcelin v. Mancusi 462 F. 2nd. 36, 46 (2 cir. 1972), Judge Kaufman dissenting with respect to the denial of the effective assistance of counsel, stated that

"The majority opinion, it seems to me falls prey to the pitfalls of rigid adherence to phrases and formulas which seem to gain strength by ritualistic repetition in baec verba in case after case. With the most respect for my brothers, I fear the majority opinion chants the teachings of the time-worn doctrine of this Circuit, but fails to weigh carefully the appropriateness of borrowing the words for application to this case." (emphasis added)

With respect to the denial of due process due to incompetence of counsel, see United States x rel Rosner v. Commissioner, N.Y.S. Dept. of Corr., 421, F. Supp. 791, 790 (U.S. D.C. S.D.N.Y. 1976), United States ex rel, Scott v. Mancusi, 429 F. 2nd 104, 115, 116 (2 cir. 1970), United States ex rel, Johnson v. Vincent 370 F. Supp. 379, 385 (U.S. D.C. S.D.N.Y., 1974)

One point which must be shown is that even though I went to trial with counsel, there is no absolute right for me to request that he be relieved once the trial has begun. In United States ex rel, King v. Schubert, 522 F. 2nd 527, 529 (2 cir. 1975), the Court held that "'Once trial has begun...a defendant does not have the unbridled right to reject, assigned counsel and demand another.'" United States v. Calabro 467 F. 2nd., 973 (2 cir. 1972), cert. denied, 410 U.S. 926, 93 S. Ct. 1357, 35 L. Ed. 2nd 587 (1973)." (emphasis added).

In short, even if I felt that Mr. Friedman was representing me in an incompetent manner during trial, there is no absolute right to have

him removed.

The continued problem of effective assistance of counsel is one which has been the subject of numerous articles and commentaries. Chief Judge Judge Irving R. Kaufman of the Second Circuit, in an article "The Court Needs a Friend in Court, 60 A.B. A.J. 175, 178, wrote that:

"In our adversary system, the quality of justice dispensed by the courts, is ultimately dependent on the quality of advocacy provided by the bar..."

Further

"Our 'customers' - litigants and the general public - desire the best we can give. But there is yet another reason for doing a job as carefully and as well as one can - because that is where the fulfillment is."

For a complete discussion of this topic see: Burger "Counsel for The Prosecution and Defense-Their Role Under the Minimum Standards."

"American Criminal Law Quarterly, 2, Burger, "Chief Justice Burger Proposes First Steps Journal Certification of Trial Advocacy Specialists," 60 A.B.A.J. 171 (1974), Burger, "The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?" 42 Fordham L. Review 227 (1973), Finer, "Ineffective Assistance of Counsel," 58 Cornell L. Review 1077 (1973), Recent Cases "Ineffectiveness of Counsel-The Duty to Make a Reasonable Pretrial Investigation," 40 Missouri L. Review 369 (1975), Craig, "Ineffective Counsel in Texas and the Federal Courts," American Journal of Criminal Law, 60 (1972), Flynn, "Adequacy of Counsel: The Emerging Fair Trial Issue for the Seventies?" New York State Bar Journal, 19 (1975), Lee, Right to Effective Counsel: A Judicial Heuristic, "2 American Journal of Criminal Law 277 (1974), Bowman, "The Indigents Right to Adequate Defense: Expert and Investigational Assistance in Criminal

Proceedings: 6 Criminal Law Bulletin, 491 (1970), Waltz, "Inadequacy of Trial Defense Representation As A Ground for Post Conviction Relief in Criminal Cases," 59 Northwestern Univ. L. Rev. 289, Bazelon, "The Ineffective Assistance of Counsel," 42 Univ. of Cincinnati L. Rev. 1 (1973).

In short, appointed counsel did not deliver the level of competence required by De Coster or even that which this court requires as to committing "a farce or mockery of justice."

Here again, the dissenting opinion of Judge Oakes in Rickenbacker v. Warden, Docket NO. 76-2036, Slip Op. 1063, (2 cir., March 28, 1977) cannot be taken lightly. As Judge Oakes states:

"Forty-four years ago, Mr. Justice Sutherland wrote:
'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Powell v. Alabama, 287 U.S. 45, 68-69 (1932). In 1976 I think our court should recognize that the right is equally meaningless if counsel is not at least reasonably competent.'" (emphasis added) at 1076.

Based upon the aforementioned, the decision of the District Court should be reversed and the case at bar remanded back to the District Court.

CONCLUSION

For reasons set forth in the above mentioned arguments and the original brief, filed with this Court, the decision of the District Court should be reversed and the case at bar remanded back to the District Court.

Respectfully submitted,

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JUN 8 1977
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